Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

COMMENTS OF MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.

James E. Thompson
William A. Haas
William H. Courter
McLeodUSA Incorporated
6400 C Street SW
Cedar Rapids, Iowa 52404

Andrew D. Lipman
Richard M. Rindler
Jonathan S. Frankel
Swidler Berlin Shereff Friedman
3000 K Street, NW, Suite 300
Washington, DC 20007

ATTORNEYS FOR MCLEODUSA
TELECOMMUNICATIONS SERVICES, INC.

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SUMMARY

While reformulating rules governing unbundled access to incumbent network elements in accordance with *USTA II*, the Commission should seek to further a key objective of the 1996 Act – promoting facilities-based competition. Congress correctly recognized that it is neither possible nor economically efficient for competitors to duplicate the incumbent network and sought to promote competition by requiring incumbents to provide unbundled access to their networks. The Commission should revalidate that appropriate access to unbundled network elements is consistent with, and promotes, the goals of the Act.

No one disputes that CLECs are impaired without unbundled access to DS0 loops and the Commission should affirm all its findings in the *TRO*. For other loops and for transport, the evidence compiled since the *TRO* reinforces that CLECs are impaired for nearly all flavors of below-OCN level lit and dark fiber loops and transport. The evidence compiled in the state *Triennial Review Proceedings* demonstrates that there are remarkably few instances in which the *TRO* loop and transport triggers are met. BOC studies purporting to show that [95%] of connections purchased by CLECs are special access (which apparently includes IXC special access), proves that competitors are entirely dependent on incumbent ubiquitous networks to reach customers. In addition, the Commission's findings in the *TRO* of impairment for loops and transport used to serve enterprise customers remain valid for all the reasons there stated by the Commission. Nor did *USTA II* vacate loop rules, which remain in effect.

Based on the overwhelming evidence of impairment, McLeodUSA recommends the following approach. The Commission should dispense with triggers for DS1 loops, DS3 loops and DS1 transport and establish a nationwide finding of impairment. For DS-3 and dark fiber transport, the Commission should adopt a self-executing impairment test that involves a three-

tiered analysis based on wire center density. The FCC should also determine that EELs are separate UNEs.

In the *TRO*, the Commission found that incumbents' batch hot cut process created substantial barriers to entry in a number of respects. In this proceeding, the Commission should establish standards governing batch hot cuts. McLeodUSA recommends that the Commission require BOCs to, among other things, process 100-125 orders per CLEC per wire center per day. In addition, although the FCC cannot set pricing, it would be helpful if the FCC provided states with certain proxy as to the reasonable prices for both recurring and non-recurring charges associated with the hot cut process for each RBOC.

The Commission should underpin its new UNE rules with a finding that the availability of special access service is essentially irrelevant to an impairment analysis. Special access would not adequately protect CLECs against a price squeeze. The current regulatory regime governing special access has to a very significant extent removed special access from price caps that ILECs have chosen to exploit by raising special access prices. Absent UNEs, there would be essentially no constraint on ILECs' ability to subject competitors to a price squeeze. While this reason alone is sufficient to reject special access as playing a role in the impairment analysis, the Commission should also do so because BOC studies purporting to show CLEC reliance on special access are flawed and exaggerated, and because BOC unlawful policies have, as a practical matter, compelled CLECs to use special access in many instances, such as by Verizon's "no facilities" policy, BOC prohibitions on commingling, and refusal to provision EELs.

The Commission should complete this proceeding as planned by December 2004 by comprehensively addressing all issues involving transport, loops and switching. Certainty and predictability are critical for sustainable facilities-based competition in this industry.

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COMMENTS OF MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.

McLeodUSA Incorporated ("McLeodUSA") hereby files its comments in response to the Order and Notice of Proposed Rulemaking regarding alternative unbundling rules that will implement the obligations of section 251(c)(3) of the Communications Act of 1934, as amended,[1] in a manner consistent with the U.S. Court of Appeals for the District of Columbia Circuit's (D.C. Circuit) decision in *United States Telecom Ass'n v. FCC*.[2]

I. INTRODUCTION

McLeodUSA strongly urges the FCC to adopt Permanent Unbundling Rules by year-end that comprehensively address all issues involving transport, loops and switching in a holistic, rather than piecemeal, fashion. All parties need to move towards a workable solution that can withstand judicial scrutiny. Certainty and predictability are critical for sustainable facilities-based competition in this industry.

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[1] McLeodUSA refers to the Communications Act of 1934, as amended, *inter alia*, by the Telecommunications Act of 1996, as the "Communications Act", the "'96 Act" or the "Act." See *generally* 47 U.S.C. § 151 *et seq.*

II. PROMOTING COMPETITION THROUGH UNBUNDLING IS THE FUNDAMENTAL GOAL OF THE '96 ACT

The fundamental goals established in the '96 Act should dictate how the Commission evaluates whether CLECs are impaired without unbundled access to network elements. These goals already have been described by CLECs to the Commission, and the Commission has noted them in previous decisions. While the Commission must address the specific issues raised by *USTA II*, it must continue to implement the key objectives of the Act in the manner prescribed by Congress. First, the Commission must craft unbundling rules that promote a pro-competitive deregulatory environment for the telecommunications industry. As the *Verizon* Supreme Court found, the intent of the Act was to "uproot" traditional monopolies, to promote "competition in the persistently monopolistic local markets, which were thought to be the root of natural monopoly in the telecommunications industry," and to "eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises."[3] The Supreme Court cited favorably to one of the main proponents of the Act who noted that the purpose of the Act is to break up the BOCs' networks and make them available to competitors:

> This is extraordinary in the sense of telling private industry that this is what they have to do in order to let the competitors come in and try to beat your economic brains out ....It is kind of almost a jump-start .... I will do everything I have to let you into my business, because we used to be a bottleneck; we used to be a monopoly; we used to control everything. Now, this legislation says you will not control much of anything. You will have to allow for nondiscriminatory access on an unbundled basis to the network functions and services of the Bell operating companies network

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2 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*), *pets. for cert. filed*, Nos. 04-12, 04-15, 04-18 (June 30, 2004). *See also United States Telecom Ass'n v. FCC*, No. 00-1012, Order, (D.C. Cir. Apr. 13, 2004) (granting a stay of the court's mandate through June 15, 2004). The *USTA II* mandate issued on June 16, 2004.

3 *Verizon* at 1654.

> that is at least equal in type, quality, and price to the access [a] Bell operating company affords to itself.[4]

Second, unbundled access to network elements is a principal mechanism under the Act for promoting competition. The Commission has found that the Act provides for three different modes of competition: resale, UNEs, and building facilities,[5] any one of which (or combination of which) fulfills the goals of the Act. The Act also establishes unbundling as a key approved mechanism for promoting competition by requiring unbundling as a precondition of BOC long distance entry. Section 271 establishes that the ILECs must unbundle key network elements as a continuing condition of providing inter-LATA long distance service.[6] For all practical purposes, the unbundling requirements in both Section 251 and Section 271 are the cornerstones of the 1996 Act's pro-competitive framework.

Accordingly, while addressing the narrower issues raised by *USTA II*, the Commission may and should seek to promote competition by providing for appropriate unbundled access to incumbent network elements.

III. THE COMMISSION SHOULD RETAIN THE IMPAIRMENT STANDARD ESTABLISHED IN THE *TRO*

While *USTA II* may require some changes to the implementation of the *TRO* impairment standard, it does not require modification of the standard itself. That standard – whether lack of access to a network element would "pose[] an entry barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic"[7] –

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4 *Verizon* at 1661, citing 141 Cong. Rec. 15572 (1995). (Remarks of Sen. Breaux (La.) on Pub.L. 104-104 (1995)).

5 *See, e.g., UNE Remand Order* at ¶ 5.

6 47 U.S.C. § 271(c)(2)(B).

7 *TRO* at ¶ 84.

should therefore be reaffirmed and used in this proceeding.[8] The court, however, indicated that the standard should be clarified to specify "uneconomic by whom."[9] The '96 Act itself provides the answer, but perhaps not an answer that will be acceptable to the panel that controls this case at the D.C. Circuit. The Act directs the Commission to consider the impairment of "the telecommunications carrier seeking access" to the ILEC networks.[10] So the impairment test should measure whether market entry would be uneconomic by each of these requesting carriers.

In order to withstand judicial scrutiny, however, the Commission should clarify that the economic test for impairment is to be measured in the context of a reasonably efficient competitor. The Commission should not adopt any narrower construct -- to limit UNE access to only the "hypothetically most efficient competitor" using only "the most efficient technology available" could result in unbundling being available in theory but never reality. Congress did not adopt the Act to engage the Commission in theoretical exercises – it adopted the Act "to promote competition,"[11] and it ordered the Commission to implement its unbundling regulations within six months so that such competition could be realized as quickly as possible.[12]

Therefore, in this proceeding, the Commission should order unbundling where lack of access would pose an entry barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic by a reasonably efficient competitor.

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8 *See generally USTA v. FCC*, 359 F.3d at 571-573.

9 *USTA v. FCC*, 359 F.3d at 572.

10 47 U.S.C. § 251(d)(2)(B) (emphasis added).

11 Preamble, Telecommunications Act of 1996. The Commission previously noted in attempting to define impairment that this preamble "gives the best snapshot of Congress's overall intent in enacting the 1996 Act." *TRO* at ¶ 70.

12 47 U.S.C. § 252(d)(1).

IV. DS0 LOOPS SHOULD BE SUBJECT TO A NATIONWIDE FINDING OF IMPAIRMENT

In the *TRO*, the Commission found that CLECs "are generally impaired on a national basis without unbundled access to an incumbent LEC's [DS0] local loops, whether they seek to provide narrowband or broadband services, or both."[13] In support of this conclusion, the Commission found that deploying DS0 local loops for mass-market customers is "prohibitively expensive"[14] and that the costs are "largely fixed and sunk."[15] Furthermore, the relevant marketplace evidence illustrated the absence of any reasonable competitive sources of mass-market DS0 loops, and the Commission concluded that ILECs "continue to control the vast majority of voice-grade local loops throughout the nation."[16] McLeodUSA affirmatively states that it cannot overbuild "last mile" bottleneck facilities in an economic and efficient manner, and thus remains impaired without continued unbundled access to DS0 loops.[17]

This conclusion has never been challenged by the ILECs and was not addressed by the court in *USTA II*. Moreover, economic and ubiquitous intermodal alternatives to DS0 loops do not exist. Indeed, unbundled DS0 loops are sacrosanct for McLeodUSA, who would be unable to serve virtually all of its customers without unbundled access to these loops. Accordingly, the Commission should reaffirm its national impairment finding as to DS0 loops.

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13 *TRO* at ¶ 248.

14 *TRO* at n.716

15 *TRO* at ¶ 237.

16 *TRO* at ¶ 224.

17 *See* Attachment 1, Declaration of Todd Lechtenberg at ¶ 3 ("Lechtenberg Declaration").

V. DS1 LOOPS SHOULD BE SUBJECT TO A FINDING OF NATIONAL IMPAIRMENT

A. The *TRO* Impairment Finding Regarding DS1 Loops Remains Valid

In the *TRO*, the Commission unanimously supported the continued availability of unbundled access to DS1 loops on a nationwide basis, because the record proved that self-provisioning DS1 loops was not an economically viable option and there was little evidence of competitive wholesale alternatives.[18] The evidence of impairment of DS1 loops was so compelling that the Commission chose not to delegate to the states the authority to consider DS1 loop impairment based on a self-provisioning trigger.[19] Since then, nothing has changed to warrant anything less than a finding that carriers are impaired without unbundled access to DS1 loops.

B. Self-Provisioning of DS1 loops is Not an Economic Option

Like the FCC's findings in the *TRO*, there is "little evidence of competitive LECs' ability to self-deploy single DS1 capacity loops and scant evidence of wholesale alternatives for serving customers at the DS1 level."[20] Carriers seeking to serve DS1 enterprise customers still "face extremely high economic and operational barriers in deploying DS1 loops to serve these customers." It continues to be the case that it makes no economic sense for a competitive carrier to "construct its own DS1 or lower capacity loops" because "[c]ustomers demanding services over DS1 loops possess significantly different economic characteristics for competitive carriers than large enterprise market customers."[21] In particular, small and medium sized enterprise

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18 *TRO* at ¶¶ 325-27, 390-92.

19 *TRO* at ¶¶ 327, 334, 391, 409.

20 *TRO* at ¶ 325; *see* Lechtenberg Declaration at ¶ 4.

21 *TRO* at ¶ 325; *see* Lechtenberg Declaration at ¶ 5 ("Most businesses ant a maximum 12-month term contract, which prevents McLeodUSA economically from deploying a DS1 loop to that specific location.")

customers served by DS1 loops still "provide much lower revenue opportunities than large enterprise market customers and, generally, resist long-term contract obligations." These customers continue to have "a greater potential to change providers on a more frequent basis, resulting in the inability of competitive carriers to rely on a long-term DS1 revenue stream, as they can with much higher loop capacity demands for large business customers."[22]

Consistent with the *TRO*, the Commission's self-provisioning impairment finding should rely most heavily on the economic feasibility of competitive LECs to self-deploy and recover sunk costs.[23] In that regard, the fact still remains that it is "economically infeasible for competitive LECs to deploy DS1 loops, which require the same significant sunk and fixed construction costs as higher capacity loops."[24] CLECs are still unable to "recover sunk costs in self-deploying DS1 loops" and that "other economic and operational barriers faced by competitive LECs in self-deploying loops generally, *e.g.*, the inability to obtain reasonable and timely access to the customer's premises both in laying the fiber to the location and bringing it into a building thereafter, as well as convincing customers to accept the delays and uncertainty associated with deployment of alternative loop facilities that exist with DS1 loop self-deployment."[25] Further, it continues to be uneconomic for CLECs "to absorb the additional 'costs' associated with these other economic and operational barriers over time especially at lower loop capacity levels and such "barriers impact the ability to self-deploy at a DS1 level to an even greater extent than at higher loop capacity levels."[26]

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22 *TRO* at ¶ 325.

23 *TRO* at ¶ 325.

24 *TRO* at ¶ 326; *see* Lechtenberg Declaration at ¶ 4.

25 *TRO* at ¶ 326.

26 *TRO* at ¶¶ 326 (citing ¶ 315 of the *TRO* that discusses the ability to absorb these costs at the OCn loop level).

C. No Competitive Wholesale Alternatives Exist for DS1 Loops

As to competitive wholesale alternatives for DS1 loops, the record still has "little evidence" that such last-mile bottleneck alternatives exist.[27] CLECs are still impaired without unbundled access to DS1 loops because viable wholesale alternatives are only available on a *de minimus* basis. In fact, there are an estimated three million buildings in the United States that ILECs serve and the record reveals that CLECs deploy their own alternative facilities to only one percent of them at most.[28] Evidence shows that alternative competing providers remain confined to a small number of buildings in a small number of concentrated business districts in the largest MSAs in the country.[29] Even though some "large users' requirements fall within those highly concentrated urban areas, many major companies have networks that connect, in some cases, tens of thousand of individual sites- the vast majority of which are areas where the ILEC is the only source of connectivity."[30] Indeed, the overwhelming majority of such smaller locations are nowhere near any central business districts or concentration of CLEC facilities.[31]

In the *TRO*, the FCC even recognized that competitive alternatives are far from universally available as it found that:

> When competitive LECs self-deploy fiber they predominantly do so at the OCn-level.... In contrast, the record contains little evidence of self-deployment, or availability from alternative providers, for DS1 loops. As for DS3 loops, evidence of self-deployment and wholesale availability is somewhat greater than

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27 *TRO* at ¶ 327.

28 Letter from Colleen Boothby, Counsel for Ad Hoc Telecommunications Users Committee, to Marlene Dortch, Secretary, FCC, CC Docket No. 01-338 (filed August 26, 2004) attaching white paper entitled "Competition in Access Markets: A Reality or Illusion" (referenced herein as "Ad Hoc Users Report").

29 Ad Hoc Users Report, at 12.

30 *Id.* at 12. Noting that a bank network would typically serve hundreds or thousands of branches and thousands or tens of thousands of ATMs; an airline network would have connections to tens of thousand of travel agents; an automobile manufacturer's network would provide service to thousands of auto dealerships. *Id.* at n.16.

31 Ad Hoc Users Report, at n.16.

> for DS1s and is directly related to location-specific criteria. Indeed, competitive LECs agree that at a three DS3 loop capacity level of demand, it is economically feasible to self-deploy....[32]

The fact still remains that even though CLECs have deployed limited amounts of fiber along major streets in some concentrated business districts, those facilities are only physically connected to a small fraction of the buildings they pass.[33] This is the case because the cost to establish a connection is tremendous and only incurred in limited circumstances when actual or potential customer demand within a specific building is sufficiently large enough that costs associated with establishing that connection can realistically be recovered.[34]

Evidence recently submitted by Verizon, SBC, and Qwest in this proceeding fully illustrates and substantiates the extent of enterprise customer's "significant and utter" dependence upon the facilities of these RBOCs, even in areas that are considered the most competitive local service markets in the country.[35] In these filings, these RBOCs provided maps purporting to display locations of enterprise customers being served by CLEC-owned facilities. Conspicuously missing from these maps is information regarding the nature and type of the facilities that are offered, OCn, DS3, or DS1. Notably, just because a CLEC may offer OCn loops, for example, does not mean that the same CLEC offers DS1 loops.[36] Further, just because some building in some of the largest MSAs locations are also being served by CLEC-owned facilities in no way diminishes a RBOC's "absolute monopoly at all locations where no

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32 *TRO* at ¶¶ 205-206, 298.

33 Ad Hoc Users Report, at 13.

34 *Id.* at 13.

35 *Id.* at 13.

36 *TRO* at n. 1216 & n. 1218.

alternative facilities are in place or at locations at which customer demand is insufficient to make CLEC entry economically feasible."[37]

If one aggregates all the facilities deployed by CLECs, cable companies, and fixed wireless providers, it is estimated that 98% of commercial buildings are exclusively assessed by the ILEC.[38] AT&T states that of the 186,000 buildings it serves only 5 percent are served with its own facilities or that of an alternative provider and the rest are provisioned exclusively by the ILEC.[39] Sprint likewise relies upon the ILECs for more than 93% of its needs.[40]

Carriers, like AT&T and Sprint, typically seek out opportunities to purchase service from other non-ILEC carriers so as to expand the number of buildings where they can bypass ILEC facilities.[41] AT&T has done so and uses CLEC facilities or approximately 3,700 of the approximately 14,000 locations where such facilities are available.[42] AT&T is reluctant, however, to purchase CLEC access facilities, even where they exist[43] and has stated that,

> IXCs that depend upon CLECs for special access often confront a level of uncertainty that threatens to impair their continuing use of such competitive alternatives. Moreover CLECs are not always able to secure the building owners' permission to local equipment in the building's common space, so that in many cases access is limited to a "fiber to the floor" arrangement in which only particular floors in the building can be served. Thus even where there is competitive special access in a building, there is not always competitive special access available to serve all the customers in that building.[44]

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37 Ad Hoc Users Report, at n.19.

38 *Id.* at 16.

39 *Id.* at 17.

40 *Id.* at 17.

41 *Id.* at 18.

42 *Id.* at 18.

43 *Id.* at 18.

44 *Id.* at n.32 (citing RM 10593 Declaration of Kenneth Thomas on Behalf of AT&T, at 2 & 4).

Retail customers have similar reservations. Ad Hoc Users have found that viable competitive alternatives to the ILEC's DS1 loops were available in less than ten percent (10%) of their locations.[45] Ad Hoc Users also noted the specific criteria they consider in determining whether they can use a competitive carrier at those locations if one is available. Specifically, they stated that,

> Service quality, reliability, and security are all critical issues that business end users must consider when evaluating competitive alternatives to the ILEC's broadband service offerings. CLEC network ubiquity and price are two other interrelated issues. Because CLEC networks are not as ubiquitous as those of the incumbents, many business service locations seeking broadband services from a CLEC either require (1) additional build-out by the competitor, or (2) "backhauling" of access to the CLEC POP (at the customer's expense). Either outcome increases the cost of service as compared to the ILEC, creating additional barriers for CLEC efforts to penetrate the business end user market.[46]

In the end, "issues of total cost, network integration, reliability, and responsiveness ultimately determine whether a competitor's service is considered by an end user to be a viable alternative in the first place."[47] Indeed, just because there may be competitors in a given market, the services provided by them are compared with those offered by the ILEC and must satisfy the customer's standards for purchase and use.[48] Because of these considerations, CLEC services "rarely" meet Ad Hoc's members' needs and as such, "it is clear that the business data service market is far from being effectively competitive...."[49]

As a result of the lack of wholesale alternatives for DS1 loops, RBOCs have exploited their dominant position in the marketplace. Indeed, RBOCs fully recognize the lack of

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45 *Id.* at 20

46 *Id.* at 21

47 *Id.* at 21

48 *Id.* at 21

49 *Id.* at 21

competitive alternatives and associated concerns and have increased special access prices after being given pricing flexibility in those markets where they convinced the Commission that competition was realized. For instance, Qwest's price for special access DS-1 circuit (10 mile length) was $410 under the price cap unit price; however, since it received pricing flexibility, Qwest has increased the price to $602.[50] This is an astronomical 50% price increase in less than 2 years.

If the marketplace were truly competitive, ILECs would be forced by competitors to lower prices, not increase them. Since, that is not the case, however, RBOCs have the incentive and opportunity to exploit their market power by increasing rates. The conduct of RBOCs speaks far louder than words and since they have no true competition in the areas where they were granted pricing flexibility, they abuse such pricing flexibly by increasing special access rates by excessive amounts rather than decreasing them. Taken as a whole, this evidence fully reveals that competitive alternatives remains nonexistent or nascent in all marketplaces (including those where the RBOCs have been granted pricing flexibility) and that CLECs remain impaired without access to unbundled DS1 loops.

D. USTA II Did Not Vacate the FCC's Enterprise High Capacity Loop Rules, Especially with Respect to DS1 Loops.

Although the above facts demonstrate that CLECs are still impaired without access to DS1 loops, the Commission need not revisit its prior findings of impairment as to DS1 loops because *USTA II* did not vacate the *TRO*'s finding of impairment for high capacity loops. Contrary to RBOC contentions,[51] *USTA II* stated that it was only vacating the findings of

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[50] Letter from Colleen Boothby, Counsel for Ad Hoc Telecommunications Users Committee, to Marlene Dortch, Secretary, FCC, CC Docket No. 01-338, Attachment 1 (filed Sept. 13, 2004).

[51] Letter from Dee May, Vice President- Federal Regulatory, Verizon, to Marlene Dortch, Secretary FCC, CC Dockets Nos. 01-338, 98-147, 96-98 at 3-5 (filed July 29, 2004) ("Verizon July 29, 2004 *Ex Parte* Letter"); Letter

impairment for switching and transport.[52] In addition, the Court relied on the availability of high capacity loops in affirming the Commission's findings concerning access to hybrid fiber-copper loops which would only have been possible if the court assumed the loop rules were still in effect.[53] Therefore, the Commission may rest on its prior impairment findings as to high capacity DS1 loops because they were undisturbed by *USTA II.*

The *USTA II* opinion confirms that the decision is limited to dedicated transport and did not involve high-capacity loops. It specifically states that dedicated transport elements are "transmission facilities to a single customer or carrier" which language is taken directly from the FCC's characterization of interoffice transport. Indeed, the FCC used the exact language in the beginning of its dedicated transport analysis in the *TRO,* which states:

> Dedicated interoffice *transmission facilities (transport) are facilities dedicated to a particular customer or competitive carrier* that it uses for transmission among incumbent LEC central offices and tandem offices.

By repeating the FCC in this manner, the D.C. Circuit unequivocally circumscribed its analysis to dedicated transport and only intended its vacatur to apply to such facilities. To be sure, the Court, in rendering its decision, only summarized and cited various paragraphs of the *TRO* that related to the FCC's dedicated transport conclusions.[54] *Not once did the court summarize or cite the FCC's conclusions in the TRO regarding DS1 loops or all high capacity loops.* Nor did the Court ever mention or suggest that its decision applied with equal force and effect to high-capacity loop facilities.

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from Michael E. Glover, Senior Vice President & Deputy General Counsel, Verizon, to Honorable Michael K. Powell, Chairman, FCC, CC Dockets Nos. 01-338, 98-147, 96-98 at 3-5 (filed July 19, 2004).

52 *USTA II,* 359 F.3d at 594.

53 *Id.*

54 *USTA II,* 359 F.3d at 573-74.

Further, the FCC's strict self-provisioning impairment finding as to DS1 loops remains undisturbed by *USTA II*. Although the D.C. Circuit vacated portions of the *TRO* that delegated to state commissions the authority to determine whether CLECs were impaired without access to unbundled switching and dedicated transport, the FCC did not "delegate to the states the authority to consider DS1 loop impairment on a location-specific basis based on a self-provisioning trigger."[55] Because of this, the D.C. Circuit did not vacate the Commission's express finding that CLECs were impaired without access to DS-1 loops. Therefore, this Commission decision still stands.

ILECs bemoan that the *USTA II* finding that the Commission ignored facilities deployment along similar routes and the availability of tariffed ILEC special access services are two independent grounds for vacating the Commission's DS-1 loop impairment finding discussed above.[56] However, as previously discussed, the court's analysis in *USTA II* was limited to dedicated transport. The Court only cites paragraph 401 of the *TRO,* which is part of the Commission's route-specific dedicated transport discussion, and limits it criticisms to the FCC's route-specific analysis between ILEC end offices (which are transport facilities). Moreover, *USTA II* did not overturn or criticize, either implicitly or explicitly, the Commission's "location" specific non-impairment analysis set forth in *TRO* paragraph 328 that should be used in determining if high capacity loops should remain unbundled.[57] Furthermore, *USTA II* specifically vacated paragraphs 102 and 103 of the FCC's *TRO* regarding its consideration of special access in the context of its discussion of the FCC's dedicated transport determinations. It did not invalidate the Commission's refusal to give states the authority to determine "DS-1 loop

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55 *TRO* at ¶ 327.

56 Verizon July 29, 2004 *Ex Parte* Letter, at 4-5.

impairment on a location-specific basis based on a self-provisioning trigger" and its general finding that CLECs were impaired without access to DS-1 loops because the record fully demonstrates that it is economically infeasible for competitive LECs to deploy DS1 loops.[58] For these reasons, the Commission's prior findings in the *TRO* were no disturbed by *USTA II* and do not need to be revisited.

VI. DS3 LOOPS SHOULD BE SUBJECT TO A NATIONAL IMPAIRMENT FINDING.

Consistent with the *TRO*, CLECs are still "impaired on a customer-location-specific basis without access to unbundled DS3 loops."[59] CLECs continue to be unable to "recover the significant fixed and sunk construction costs of DS3 loops" and overcome "the additional barriers to loop deployment associated with accessing rights-of-way such as obtaining and paying for building access and other service provisioning delays that impair the ability of requesting carriers to self-provision single DS3 loops."[60] Other economic and operational barriers prevent self-deploying DS3 loops, including difficulties in acquiring municipal and private rights-of-ways as well as gaining building access from owners of multiunit premises. Accordingly, unlike an OC3 loop, a single DS3 loop cannot "provide a sufficient revenue opportunity to overcome these barriers."[61] Based on the Commission's impairment analysis that rests most heavily on the ability of a self-deploying carrier to recover its sunk and fixed costs,

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57 *TRO* at ¶ 328.

58 *TRO* at ¶ 327; *see* Lechtenberg Declaration at ¶ 4.

59 *TRO* at ¶ 320; *see* Lechtenberg Declaration at ¶ 6.

60 *TRO* at ¶ 320; *see* Lechtenberg Declaration at ¶ 6.

61 *TRO* at ¶ 320; *see* Lechtenberg Declaration at ¶ 6.

CLECs are still impaired without access to DS3 loops due to their inability to recover such costs at the DS3 level.[62]

As the *TRO* recognized, although competitive alternatives may be available to a small fraction of buildings in dense urban areas, the vast majority of areas have no alternative DS3 loops offered on a wholesale basis.[63] Recent RBOC filings have focused on the top 50 MSAs as areas where there may be instances of DS3 loop non-impairment.[64] Given this, the Commission should focus its non-impairment analysis on the top 50 MSAs. In those areas outside the top 50 MSAs, CLECs are conclusively impaired on a customer-location-specific basis due to significant fixed and sunk construction costs of DS3 loops and the economic and operational barriers that must be overcome to serve such locations.

Even a close examination of these top 50 MSAs reveals that competitors have self-deployed DS3 loops to a small number of locations or made such loops available at wholesale. McLeodUSA understands that the QSI Study, which will be submitted by other CLECS, affirms this conclusion based on non-impairment data collected on 12 states that conducted state TRO proceedings. The study concludes that only 128 buildings satisfied the DS3 self provisioning trigger and only 49 buildings satisfied the wholesale trigger for DS3 loops.

The QSI Study also shows that in these top tier areas competitors have self-deployed DS3 loops to a small number of locations or made such loops available at wholesale. It is therefore unremarkable that CLECs are providing their own fiber facilities at most to only one percent of

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62 *TRO* at ¶ 320; *see* Lechtenberg Declaration at ¶ 6.

63 *See TRO* at ¶ 321-22; *see* Lechtenberg Declaration at ¶ 6 ("The overwhelming majority of our DS3 loops, however, are lease from the RBOCs, and there are virtually no viable alternatives that offer DS3 loops on a competitive wholesale basis."

64 *See, e.g., id.*; SBC Aug. 18, 2004 *Ex Parte* Letter; Qwest Aug. 20, 2004 *Ex Parte* Letter.

the estimated three million buildings in the United States that ILECs serve.[65] As a general matter, those fiber loops are deployed with the intention of serving customers with multiple DS3s worth of demand. This is so because self-provisioning loops to serve only a single DS3 worth of demand is not cost justified when considering all the costs, including cost associated with multiplexing equipment needed to channelize digital circuits over optical facilities.

McLeodUSA understands that the QSI study recognizes that even if a carrier has deployed DS3 loop facilities to a specific customer within a certain building, that does not mean that the carrier has access to other customers in the building or access points throughout the building (including, in multi-tenant buildings, access to the same common space, house, and riser, and other intra-building wire) as the ILEC enjoys.[66] In many cases, CLEC access is limited to a "fiber to the floor" arrangement with the customer it serves because CLECs are unable to secure building owners' permission to locate equipment in the buildings common space or access other floors in a building.[67] As a result, such CLECs are thereby precluded from serving customers on different floors within the same building.

Because of the scant evidence of DS3 loop non-impairment, a conclusive and non-rebuttable nationwide DS3 loop impairment finding is justified. Although a general finding of this nature may include some false negatives and positives, a sensible definition is not full proof. The odds of false results, however, are extremely limited due to (1) the small number of known locations in which one or two DS3 circuits are served by alternative providers, (2) the significant costs associated with providing DS3s, and (3) the two DS3 cap established in the *TRO*.

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65 Ad Hoc Users Report, at 12.

66 47 U.S.C. 51.319(a)(4)((ii)(B); *TRO* at ¶ 337.

Accordingly, it is not necessary for the Commission to perform or consider a potential provisioning analysis in determining DS3 loop non-impairment. The Commission has already restricted the availability of loop and transport UNEs by placing strict limits on the capacity levels (2 DS3s for loops, 12 DS3s for transport) that any individual CLEC may obtain at a given location. There is still overwhelming evidence that CLECs remain impaired without the limited access granted by the *TRO* to UNEs at these lower-capacity levels, because "the potential revenue stream associated" with lower-capacity facilities "is many times smaller than that" of a higher-capacity facility.[68] These lower revenues are highly unlikely to cover the high fixed and sunk costs of facilities deployment, and compound the "other economic and operational barriers" that CLECs face in deploying their own DS3 loops.

VII. DS1 DEDICATED TRANSPORT SHOULD BE SUBJECT TO A NATIONAL IMPAIRMENT FINDING.

A. Impairment Exists

CLECs continue to be impaired without unbundled access to DS1 dedicated transport in most markets. As the *TRO* found with respect to DS1 transport, CLECs still "cannot self-provide DS1 transport" and are "impaired without access to DS1 capacity transport" because of "the high entry barriers associated with deploying or obtaining transport used to serve relatively few end-user customers and the lack of route-specific evidence showing sufficient alternative deployment."[69] The fact still remains that

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[67] *See* Lechtenberg Declaration at ¶ 6 ("... in many cases, McLeodUSA's access in building is limited to 'fiber to the floor' arrangement with the customer it serves because McLeodUSA is unable to secure building owners' permission to locate equipment in the buildings common space or access other floors in the building.")

[68] *TRO* at ¶ 320 n.945.

[69] *TRO* at ¶ 390-91; *see* Lechtenberg Declaration at ¶ 7.

> A carrier requiring only DS1 capacity transport between two points typically does not have a large enough presence along a route (generally loop traffic at a central office) to justify incurring the high fixed and sunk costs of self-providing just that DS1 circuit. This is because a requesting carrier in need of DS1 capacity transport faces the same fixed and sunk costs as other carriers deploying transport or using alternatives, but faces substantially higher incremental costs across its customer base than a carrier requesting higher capacity transport.[70]

Furthermore, based on the *TRO*, the record still indicates that, "although competitive fiber has been deployed in many areas, DS1 transport is not generally made available on a wholesale basis...."[71] The market for competitive wholesale DS1 transport, however, remains "nascent, even where higher capacity competitive transport is already made available on a wholesale basis" and there have been no "technological advances [that] may allow this market to become practical."[72] Moreover, RBOC abuse of the pricing flexibility that has been granted to them, as discussed previously, is writing on the wall that there is little, if any, competitive wholesale alternatives for DS1 transport.

In short, the decision and record in the *TRO* that establishes a nationwide impairment for DS1 transport remains valid. The Commission may continue to rely on it along with recent

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[70] *TRO* at ¶ 391 (footnotes omitted).

[71] *TRO* at ¶ 392 & n.1216 (explaining that "While it is relatively common for carriers to obtain wholesale transport at higher capacities, we have very limited evidence of carriers using alternative DS1 transport. AT&T "almost never" uses non-incumbent LEC facilities for its DS1 transport while it uses non-incumbent LEC facilities a substantially higher percentage of its DS3 transport.") (citing AT&T Comments at 149-50 (citing confidential data); Cbeyond Nov. 22, 2002 Transport *Ex Parte* Letter, Declaration of Richard Batelaan at ¶. 11 (concluding that "alternative providers for DS1 level transport are at best nascent"); NuVox *et al.* Comments, Affidavit of Edward J. Cadieux (NuVox Cadieux Aff.) at para. 9 (where "third-party providers exist they either do not offer dedicated transport at the DS1 level (only at the DS3 level or higher) or that operational interfaces at the DS1 level are too problematic for third-party providers to be a viable facility source."); ALTS/CompTel Oct. 28, 2002 Transport *Ex Parte* Letter at 3 (stating that competition at the DS3 capacity level does not equate to competition for DS1 transport)); *see* Lechtenberg Declaration at ¶ 7 (explaining that there are no wholesale alternatives on DS1 transport in the majority of McLeod's markets).

[72] Competing transport providers would have to install additional multiplexing equipment and refine back office systems to handle DS1 interface wholesale transport. See *TRO*, n. 1218 (citing KMC Duke Aff. at ¶. 13; NuVox Cadieux Aff. at ¶ 9 (where "operational interfaces at the DS1 level are too problematic for third-party providers to be a viable facility source"); Eschelon Kunde Aff. at ¶ 11 (describing the costs associated with using multiple transport vendors including the added complexity of managing multiple contracts, ordering processes, maintenance processes, and bills).

record evidence to justify or readopt a finding that CLECs are impaired without access to DS1 transport.

B. RBOC Studies Regarding Special Access Use Are Inaccurate And Misleading.

Prior to the release of this NPRM, RBOCs submitted hundreds of pages of evidence that they argued demonstrated that CLECs are not impaired without access to high capacity loop and transport facilities.[73] The RBOCs contend that competitors are using special access facilities to compete successfully. In particular, Verizon contends that competing carriers do not need unbundled DS1 facilities because 93 percent of the DS1 loops and 95 percent of the DS1 loop and transport combinations that they obtain from Verizon are purchased as special access.[74]

These arguments are nonsense and if anything, prove the opposite. As discussed below, special access should be deemed irrelevant in an impairment analysis. Verizon's percentages further demonstrate that competing carriers are not self-provisioning these facilities nor are they obtaining them from alternative wholesale providers which is consistent with the points made above. Moreover, Verizon ignores the real reasons why these percentages are so high, namely: (1) the FCC's EEL usage restrictions bar long distance carriers from using EELs to provide long distance services; (2) Verizon's unlawful "no facilities" policy may account for CLECs use of

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[73] See Letter from Michael E. Glover, Senior Vice President & Deputy General Counsel, Verizon, to Marlene Dortch, Secretary, FCC, CC Dockets Nos. 01-338, 98-147, 96-98 (filed July 2, 2004) ("Verizon July 2, 2004 *Ex Parte* Letter"); Letter from Dee May, Vice President- Federal Regulatory, Verizon, to Marlene Dortch, Secretary FCC, CC Dockets Nos. 01-338, 98-147, 96-98, at 3-5 (filed June 24, 2004) ("Verizon June 24, 2004 *Ex Parte* Letter"); Letter from Christopher M Heimann, General Attorney, SBC, to Marlene Dortch, Secretary, FCC, CC Dockets Nos. 01-338, 98-147, 96-98 (filed Aug. 18, 2004); Letter from Cronan O'Connell, Vice-President-Federal Regulatory, Qwest, to Marlene Dortch, Secretary, FCC, CC Dockets Nos. 01-338, 98-147, 96-98 (filed August 20, 2004).

[74] Verizon July 2, 2004 *Ex Parte* Letter, at 2 & Attachment at 19.

special access in Verizon Territory;[75] (3) the failure of RBOCs to provision UNEs without delay and properly bill them does as well;[76] (4) the fact that CLECs used special access loop combinations because UNEs were not available or as a result of BOC prohibitions on commingling;[77] or (5) the fact that CLECs have been locked in to special access by volume and term discount tariffs.[78] Verizon's related contention that CLECs prefer special access services because they have not converted such services to UNEs or delayed doing so is equally fallacious because CLECs were precluded from doing so for a combination of these reasons.[79] In summary, Verizon's stats reveal the limited competitive alternatives available in the marketplace and that CLECs are impaired without access to unbundled DS1 loops, transport, and EELs.

VIII. DS1 EELS SHOULD BE TREATED AS A SEPARATE UNE OR AVAILABLE TO THE EXTENT THERE IS DS1 LOOP IMPAIRMENT.

In the *TRO*, the Commission recognized the vital importance that access to EELs plays in fostering facilities-based competition and innovation. The FCC expressly stated that "[b]ased on the record before us, we conclude that EELs facilitate the growth of facilities-based competition in the local market" and allows carriers to economically serve many more customers and promote "self-deployment of interoffice transport facilities."[80] The Commission further found that EELs promote innovation "because competitive LECs can provide advanced switching

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75 *See* Letter from Andrew Lipman, Swidler Berlin Shereff Friedman, LLP to Marlene Dortch, Secretary, FCC, FCC Nos. 96-98, 98-147, 01-338, (filed Aug. 9, 2004) ("Cbeyond *et al.* Aug. 9, 2004 *Ex Parte* Letter").

76 *See* Cbeyond *et al.* Aug. 9, 2004 *Ex Parte* Letter, at 2.

77 *See* Cbeyond *et al.* Aug. 9, 2004 *Ex Parte* Letter, at 3.

78 *See* Cbeyond *et al.* Aug. 9, 2004 *Ex Parte* Letter, at 3.

79 *See* Verizon July 2, 2004 *Ex Parte* Letter, Attachment, at 29.

80 *TRO* at ¶ 576.

capabilities."[81] The same holds true today and DS1 EELs are critical in bringing cutting edge innovation, feature rich service offering, and dynamic high capacity DS1 services to small and medium sized business customers.

The Commission declined in the *TRO*, however, to designate EELs as a separate UNE for which an impairment analysis is necessary.[82] Instead, the Commission viewed EELs as "UNE combinations consisting of unbundled loops and unbundled transport."[83] The Commission explained that to the extent "DS1 transport facilities are available along a specific route, for example, the incumbent LEC must provide (upon request) a DS1 EEL consisting of unbundled loop and unbundled transport facilities to any requesting carrier that qualifies for access to that combination."[84]

If the Commission makes a rebuttable finding of impairment for DS1 loops and transport, the Commission should not treat the availability of a DS1 EEL based on the sum of the parts (i.e., impairment must exist on both the loop and transport routes of the combination). Determining the availability for a DS1 EEL in this regard is inappropriate and fails to recognize that CLECs may still be impaired if there is a non-impairment finding on the loop or transport portion of the combination or both.

For instance, if the Commission finds that CLECs are not impaired without access to a DS1 loop at a certain location because the DS1 loop wholesale trigger is satisfied, that does not necessarily mean that the competitive wholesale loop providers that satisfy the trigger will also provide alternative wholesale DS1 EELs or the DS1 transport needed for the EEL combination.

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81 *TRO* at ¶ 576.

82 *TRO* at ¶ 575.

83 *TRO* at ¶ 575.

84 *Id.*

Likewise, if the Commission finds CLECs are not impaired without access to DS1 transport on a certain route because the DS1 transport wholesale trigger is satisfied, that does not suggest that the competitive wholesale transport providers that satisfy the trigger will also provide an alternative wholesale DS1 EEL or the DS1 loop needed for the EEL combination.

Moreover, if the Commission finds non-impairment based on different wholesale alternative providers for the DS1 loop and transport components of an EEL, CLECs will likely face extremely high economic and operational barriers in trying to have these different providers combine their separate loop and transport facilities in a manner that produces a substitute to a ILEC's UNE DS1 EEL offering. Such high economic and operational costs include the inability of CLECs to obtain reasonable and timely cross connects between the loop and transport facilities as well as customer unwillingness to accept the delays and uncertainty associated with trying to have basic DS1 facilities provisioned through two alternative wholesale providers.

As the Commission recognizes, the crux of a non-impairment finding based on the satisfaction of the wholesale trigger is that the alternative transmission providers offer "equivalent" or "comparable" wholesale products to that of the ILEC.[85] Therefore, because a non-impairment finding on a loop or transport portion of a EEL does not necessarily mean that alternative wholesale provider offers equivalent or comparable EEL substitutes, the Commission should establish and apply a separate non-impairment wholesale trigger for DS1 EELs. The test should be a combination of the loop and transport triggers and be both location- and route-specific. In application, the only time the DS1 EEL trigger should be deemed satisfied is if suitable wholesale DS1 EELS are available from a particular customer location and use the same transport route that the ILEC uses. Otherwise, the Commission should find that CLECs are

generally impaired without unbundled access to DS1 EELs.

If the Commission, however, is disinclined to establish a separate DS1 EEL wholesale trigger, the Commission, in the alternative, should strictly base the availability of EELs on the availability of DS1 loops (i.e., the availability of DS1 transport as a UNE should not limit the availability of a DS1 EEL). This is appropriate because when used as part of a DS1 EEL, DS1 transport merely extends the reach of the loop. Furthermore, unlike typical transport, DS1 transport used in an EEL does not aggregate traffic from multiple customers. Instead, the transport portion of the DS1 EEL is dedicated and provides dial tone to a single customer.[86] Indeed, an EEL "extends the geographic reach for competitive LECs because EELs enable requesting carriers to serve customers by extending a customer's loop from the end office serving that customer to a different end office in which the competitive LEC is already located."[87] Because of this, a carrier's ability to recoup the costs of the EEL depends solely on the revenue from the single customer served by that EEL.[88] Thus, DS1 transport when used to extend the reach of a DS1 loop shares the same economic hardship characteristics of that of a loop and carriers are, at a minimum, equally impaired (if not more so) without access to DS1 EELs as they are without access to stand-alone DS1 loops.[89] For these reasons and if the Commission does no establish a separate DS1 EEL wholesale trigger, only non-impairment

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85 *TRO* at ¶¶ 337; 47 U.S.C. 51.319(a)(4)(ii) & 51.319(e)(1)(ii).

86 *See TRO* at ¶¶ 206, 576.

87 *TRO* at ¶ 576.

88 *TRO* at ¶ 206.

89 *TRO* at ¶ 206.

IX. DS3 AND DARK FIBER TRANSPORT - APPLICATION OF THE NATIONAL PRESUMPTION OF IMPAIRMENT TO DISCRETE CLASSES OF TRANSPORT

The *TRO* held that CLECs were presumptively impaired on a national basis without unbundled access to dedicated DS3 and dark fiber transport.[90] But in response to *USTA I*'s demand for a more granular analysis, the Commission speculated that under certain select circumstances there may be sufficient evidence of a competitive deployment on a particular transport route so as to justify a non-impairment finding. Accordingly, the *TRO* would have subjected each and every transport route in the nation to an independent impairment analysis.

But whereas *USTA I* criticized the Commission for generalizing too much, *USTA II* found fault in generalizing too little. While the court agreed that a non-impairment finding for one route did not compel a non-impairment finding for all similar routes, it found that this fact should not be deemed irrelevant either.[91] The Court found that the Commission must at least consider whether some degree of extrapolation of evidence from one route to others may be appropriate, although it conceded that in fact "it may be infeasible" to develop a standard that "may usefully be applied to MSAs or other plausible markets as a whole."[92] *USTA II* therefore still permits a route-by-route review process, but the Commission must also consider whether evidence of non-impairment for certain categories of routes is sufficiently extensive to reasonably permit a presumption of non-impairment for a narrowly-tailored class of similarly-situated routes. While route-by-route evaluations still offer the most accurate means of determining impairment, the Commission may reasonably be able take certain classes of routes off the table if supported by

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90 *TRO* at ¶ 359.

91 *USTA II*, 359 F.3d at 575.

92 *USTA II*, 359 F.3d at 575 (parentheticals omitted).

substantial evidence – some that would be exempted from unbundling, and others that would be subject to unbundling without the conduct of an independent route-by-route study.

The evidence from the state *TRO* proceedings and from parties on all sides is starting to show the outlines of certain patterns of competitive deployment of fiber transport facilities that may permit such precise assumptions. It appears that the record in this proceeding will likely show: (1) significant deployment between the very largest wire centers in the urban cores of the top 50 metropolitan areas (MSAs); (2) a mixed record between medium-sized wire centers in these largest metropolitan areas; and (3) scant deployment outside the top 50 MSAs. As set forth below, McLeodUSA is confident that the record will adequately support a blanket determination of impairment for the third category, and does not rule out the possibility that the ILECs will be able to justify a blanket determination of impairment for the first. The routes in between these two categories should remain subject to the presumption of impairment and the trigger review established by the *TRO*.

A. The Commission May be Able to Justify a Blanket Presumption of Non-Impairment for the Largest Wire Centers in the Top 50 MSAs

The ILECs' own presentations confirm, particularly by their omissions, that competitive deployment is essentially limited to just certain routes in the largest MSAs. Verizon, for example, recently emphasized that competitive deployment is "most heavily concentrated" between just 8% of its wire centers in its twenty largest MSAs.[93] SBC emphasizes CLEC deployment in the sixty-one largest metropolitan areas nationwide "where demand for high capacity services is concentrated."[94] Moreover, the data and maps presented by Verizon and SBC, even if they are accurate, suggest that the vast majority of all competitive deployment

[93] Verizon July 2, 2004 *Ex Parte* Letter, Attachment 1, at 6.

nationwide exists only within certain pockets of the largest MSAs.[95] This fact is corroborated by the Ad Hoc Telecommunications Users Report, which concluded that "special access services from competing providers remains confined to a small number ... of concentrated business districts."[96] Therefore, McLeodUSA remains open to the possibility that the Commission could, based upon evidence presented in this proceeding, establish a presumption of non-impairment for dedicated DS3 transport in the top 50 MSAs between wire centers each serving more than a minimum number of business access lines.[97]

B. The Commission Should Make a Blanket Finding of Impairment for Smaller Wire Centers and All Routes Outside the Top 50 MSAs

But just as the Commission may reasonably be able to assume non-impairment in certain portions of the top 50 MSAs, it also can and should establish incontestable findings of impairment for areas where evidence of actual or potential competitive deployment is so lacking that the conduct of route-by-route analyses would be a waste of the Commission's and the parties' resources. The record is abundantly clear from the *Triennial Review*, the state *TRO* proceedings and elsewhere that there is scant evidence of competitive deployment outside the top 50 MSAs, or to or from a wire center with fewer than a minimum number of business access lines even in those top 50 MSAs.[98]

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94 SBC Aug. 18, 2004 *Ex Parte* Letter at 2.

95 *See* Verizon June 24, 2004 *Ex Parte* Letter; SBC Aug. 18, 2004 *Ex Parte* Letter.

96 Ad Hoc Users Report at 12.

97 The general framework being proposed here is consistent with the proposal to be made by other competitive carriers in this proceeding. Other competitive carries suggest a minimum 40,000 business access line threshold where a finding of non-impairment would be self-executing. McLeodUSA declines to suggest a specific number at this time. Any thresholds based upon the number of access lines, however, should be as of the date established by the Commission and should only count the lines to which CLECs have unbundled access today. Future changes in technology or service patterns could result in an increase of the number of access lines that would not necessarily correspond to a decrease in impairment.

98 Even where evidence of actual deployment exists, it is questionable in hindsight whether many of these investments could or would be made today by efficient and rational competitors.

Approximately twenty-five state proceedings were conducted at least through the hearing phase. The evidence from these cases, which Commenters understand will be presented by the states and by other parties, found that very few transport routes met the *TRO*'s triggers, and of these nearly all were located between two large wire centers in a major city. For example, the New York Public Service Commission staff analyzed the nearly 4000 transport routes Verizon claimed met the triggers in its initial filing, and found that only 48 DS3 transport routes, all in Manhattan, met the FCC's self-provisioning trigger.[99]

The state commission findings of the absence of competitive alternatives outside of the major urban cores is confirmed by the persuasive and reliable third-party evidence presented by the Ad Hoc Users Report. According to the Ad Hoc Users, "competitive [dedicated transport] service is available on a very limited basis, and the [ILECs] remain the sole source of dedicated (special) access connectivity at roughly 98% of all business premises nationwide."[100] Thus even large corporate users remain "overwhelmingly dependent upon the traditional incumbent telephone monopolies for the vast majority of locations and service requirements."[101] And the ILECs' continued dominance of these markets is confirmed by their own behavior -- Qwest recently proposed a 68% increase in its tariffed DS3 special access rates,[102] while other RBOC

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99 NYPSC Staff *TRO* Analysis, Case 03-C-0821, March 31, 2004 at 4. Thirty-seven of these 44 routes also met the wholesale trigger. *See id.* at Attachments 5 and 6. Notably, for the entire State of New York, only 48 DS3 routes met the self-provisioning trigger.

100 Ad Hoc Users Report at 11.

101 Ad Hoc Users Report at 12.

102 *See* Qwest Tariff Transmittal 206; AT&T Petition to Suspend, Aug 23, 2004; Ad Hoc Users Sep. 13, 2004 *Ex Parte* Letter, Attachment 1.

special access rates remain unreasonably high.[103] The RBOCs' inflated rates for special access services could not be sustained in a competitive transport market.[104]

For these third-tier routes, therefore, the Commission would be justified in making a blanket finding that its existing presumption of impairment is elevated to a finding of impairment. The *TRO* already established, and nothing in the record contradicts, the basis for a general presumption of impairment with respect to dedicated DS3 and dark fiber transport.[105] This presumption is based upon an evidentiary record that reveals that "deploying transport facilities is an expensive and time-consuming process ... requiring substantial fixed and sunk costs," including the costs of collocation, fiber-optic cable, construction, obtaining rights-of-way, and the optical equipment to light fiber.[106] Now, on top of this presumption, the records of the state *TRO* proceedings and the utter absence of evidence of significant competitive deployment permits the Commission to move from a presumption to a finding of non-impairment for transport routes outside the top 50 MSAs and routes within the top 50 MSAs that connect a wire center with a certain minimum or fewer business access lines.

C. Transport Routes that Fall in Between Would Remain Subject to Unbundling Pending Application of the *TRO* Triggers

For the transport routes that fall between the two carve-outs generally described above, the Commission should apply the triggers on a route-by-route basis, as it originally contemplated would occur for all transport routes. The evidence submitted by the ILECs to date is not sufficient to overcome the national presumption for impairment on any more generalized basis

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103 Ad Hoc Users Report at 27-40

104 By contrasting example, Qwest's rates for ISDN (a competitive service) have fallen substantially in recent years.

105 *TRO* at ¶ 359.

106 *TRO* at ¶ 371.

outside the very largest wire centers in the Top 50 MSAs. Given the countervailing evidence of impairment as a general matter, as found by the *TRO*, these routes must remain subject to unbundling pending a final determination of non-impairment in the Commission's route-by-route analysis.

In this middle tier, substantial variability in the entry barriers among different routes seems to make it all but impossible to infer that entry on one route makes entry on another efficient. CLEC experience demonstrates that there are significant differences in the costs to construct a transport route between central offices, even from one adjacent street to another. The *TRO* therefore recognized that "operational and economic concerns ... will vary depending on the geographic market served" with the result that "the extent of competitive deployment of transport facilities can vary tremendously by geographic area."[107] For example, many major cities have prohibited additional trenching in city streets for a period of years after the city has repaved its streets.[108] An impairment test that assumed impairment throughout an entire city or metropolitan area would fail to account for such differences and would therefore fall short of the should also seek to address sources of existing impairment that are within the Commission's control.

Several additional issues are relevant to this middle tier and deal with the self-executing aspect of the impairment analysis. The first issue relates to the ongoing economic viability for alternative providers. If a wholesale provider goes out of business, for example, and the wholesale trigger test is no longer satisfied, there must be a self-executing mechanism to find

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[107] *TRO* at ¶ 376.

[108] In response to the court's hypothetical question, evidence of competition on route A to B may be explained because competitors were permitted to trench a continuous path on that route, which may not be a permissible option for the entire route between wire center A and wire center C. *USTA II*, 359 F.3d at 575.

that competitors are now impaired. The second issue would involve the minimum business access line total. If the number of business access lines increases or decreases, for example, such that the change would affect the applicable tier the transport route falls within, there needs to be a self-executing mechanism to account for this new possibility. McLeodUSA proposes that self-certification by all providers on a regular basis would allow the FCC efficiently to manage this process and account for both issues.

X. RULES CONCERNING A BATCH HOT CUT PROCESS SHOULD BE IMPLEMENTED TO ENSURE AN ORDERLY TRANSITION FROM UNE-P TO UNE-L AND PROMOTION OF INTRAMODAL, FACILITIES-BASED COMPETITION

In the *TRO*, the FCC made a national finding of impairment for mass market switching, in large part because of the evidence in the record concerning the hot cut processes. Indeed, the FCC found that hot cut capacity is limited by several factors, such as the labor intensiveness of the process, the need for highly trained workers to perform the hot cuts, and the practical limitations on how many hot cuts the ILECs can perform without interference or disruption.[109] The FCC further noted that hot cuts frequently lead to provisioning delays and service outages, and are often priced at rates that prohibit facilities based competition for the mass market.[110] Further, the barriers associated with the manual hot cut process are directly associated with ILECs' historical local monopoly, and thus go beyond the burdens universally associated with competitive entry.[111]

Significantly, the FCC also found persuasive evidence in the record that the hot cut problem would be particularly great for transferring existing mass market customers in a cost-

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109 *TRO* at ¶ 465.

110 *Id.*

effective and operationally seamless manner,[112] and that it is unlikely that ILECs would be able to provision hot cuts in sufficient volumes absent unbundled local circuit switching in all markets.[113] Indeed, in McLeodUSA's experience with SBC in the former Ameritech region, SBC has performed at most 35 hot cuts per central office per day.[114] The FCC further noted that some ILECs expressly limit the number of lines that can be cut over in a given day,[115] and that the number of hot cuts performed by BOCs in connection with the section 271 process is not comparable to the number that ILECs would need to perform if unbundled switching were not available for all customer locations served with voice-grade loops.[116]

The FCC further noted that the cost to CLECs of performing hot cuts creates a competitive barrier to entry.[117] In the *Triennial Review Proceeding*, a number of CLECs argued that the cost of hot cuts, exacerbated by churn, creates a cost disparity that makes it uneconomic to serve mass-market customers.[118] Indeed, competitors seeking to use their own switches must incur the costs associated with a hot cut, including both the charges assessed by the ILEC and their own costs of managing and participating in the hot cut process.[119] The hot cut cost assessed

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111 *Id.*

112 TRO at ¶ 467.

113 *TRO* at ¶ 468.

114 Letter from Stephen C. Gray, President, McLeodUSA, to William F. Maher, Chief, Wireline Competition Bureau, FCC, CC Docket Nos. 01-338, 96-98, 98-147, 02-33 at 12 (filed Dec. 17, 2002) (McLeodUSA Dec. 17, 2002 *Ex Parte* Letter); *TRO* at ¶ 468, n. 1430.

115 *TRO* at ¶ 468.

116 *TRO* at ¶ 469.

117 *TRO* at ¶ 470.

118 *TRO* at ¶ 470, n. 1441.

119 *TRO* at ¶ 470.

by the ILEC is a nonrecurring per-line charge on competitive carriers that connect their own switches to unbundled loops.[120] Accordingly, the FCC concluded:

> The record shows that the cost of connecting each customer to the competitive LEC's switch makes it difficult to compete. Although hot cut costs vary among incumbent LECs, we find on a national level that that these costs contribute to a significant barrier to entry... In addition to the high non-recurring charges imposed by the incumbent LECs, the evidence in the record shows that hot cuts also require significant internal resources and expenditures which must be borne by the competitive LEC. Thus, the record evidence indicates that the non-recurring costs associated with cutting over large volumes of loops would likely be prohibitively expensive for a competitive carrier seeking to provide service without the use of unbundled local circuit switching.[121]

While *USTA II* vacated and remanded the FCC's finding of national impairment for mass market switching, the DC Circuit did not expressly find fault with the FCC's findings on the hot process.[122] Accordingly, on remand the Commission can rely on the record in the *Triennial Review Proceeding* and its findings in the *TRO* to establish rules on a batch hot cut process to ensure an orderly transition from UNE-P to UNE-L.

An economic and efficient hot cut process is essential to ensure an orderly transition from UNE-P to UNE-L. A batch hot cut process that lowers the monthly recurring charges and significantly reduces the non-recurring charges for installing unbundled loops is the most efficient and logical remedy. The ILECs must be able to accurately and efficiently switch large volumes of customers to facilities-based competitive providers that use unbundled loops at a reasonable charge. Indeed, in the *TRO*, the FCC noted the hot cut process could be improved if

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120 *Id.*

121 *Id.* (footnotes omitted).

122 The court did question whether the nationwide finding of impairment for mass market switching was supportable given the FCC's validation of RBOC hot cut processes in the Section 271 context; however the court did not rule out the possibility of a national finding of impairment or reinstatement of switching. The court noted that that the FCC would need to conduct a more nuanced analysis focusing on possible criteria such as an ILEC's hot cut track record and analysis of projected demand. These findings by the court do not diminish the importance of the FCC analysis of the hot cut process in the *TRO*.

cut overs were done on a bulk basis, such that the timing and volume of the cut over is better managed.[123]

McLeodUSA urges the Commission to create rules establishing minimum federal standards for a hot cut process to ensure consistency across markets. Thereafter, the states could apply these standards in a similar fashion to application of the section 271 checklist state proceedings on ILEC entry into the long distance market. The scope of these standards should include (1) UNE-P to UNE-L with Local Number Portability (LNP) order types (encompasses both a CLEC's own UNE-P to UNE-L conversion, *plus* a 3rd party carrier's UNE-P to UNE-L); (2) resale to UNE-L with LNP order types; (3) Resale to UNE-L with LNP order types; (4) RBOC retail to UNE-L with LNP order types; and (5) CLEC to CLEC order types. The bath hot cut process must also be scaleable and apply to and handle the volume of migrating both embedded base plus all UNE-L orders for *new* customers. McLeodUSA suggests creating specific guidelines for the reasonable size of a batch is necessary and suggests a batch of 100 to 125 orders per CLEC per Central Office per day is reasonable. Furthermore, the FCC should establish TELRIC benchmark pricing for the batch hot cut process. While the FCC cannot set pricing, it would be helpful to CLECs like McLeodUSA if the FCC provided states with certain proxy as to the reasonable prices for both recurring and non-recurring charges associated with the hot cut process for each RBOC. These proxy prices should properly reflect that batch hot cut pricing should reflect efficiencies that are gained through volumes of completed batch hot cuts, such that batch hot cut pricing should decline over time as both the CLECs and an ILEC presumably achieve process efficiencies over time. Such a pricing structure would help promote facilities-based competition by encouraging CLECs to convert more customers to UNE-L

123 *TRO* at ¶ 474.

service. The pricing voluntarily offered by Qwest to MCI in its region of $25 is a good starting point for a proxy price. In order to ensure vibrant intramodal, facilities-based competition, efficient and economical batch hot cut processes are critical to transition customers to UNE-L.

XI. SPECIAL ACCESS IS IRRELEVANT TO THE IMPAIRMENT ANALYSIS TO PROVIDE WIRELINE LOCAL SERVICES AND IS NOT A PROXY FOR JUST AND REASONABLE PRICING

A. Consideration of a Network Element At Special Access Pricing Would Violate the Act

The *USTA II* Court required the Commission on remand to consider the availability of special access as a factor in its impairment analysis. As explained below, even after considering the availability of special access, the Commission should continue to conclude that CLECs are impaired without access to UNEs at TELRIC prices. The Commission, however, also should take this opportunity to explain that consideration in the impairment analysis of a non-cost based price for a network element would violate the Act.

The Commission previously determined, consistent with the Act, that if a requesting carrier is impaired without access to an element of the ILEC's network *at any price*,[124] then that element must be unbundled at TELRIC rates.[125] Analyzing the relevant provisions of the Act demonstrates that if there is impairment, then the relevant element must be provided at TELRIC. First, section 251(c)(3) provides that a non-proprietary element is made available under the Act if "the failure to provide access would impair the ability of the telecommunications carrier

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[124] At one point in its decision, even the *USTA II* court agreed that price is not a factor. "The question is . . . what the relevant benchmark is for assessing whether entry is 'impaired' if non-ILECs don't have access to UNEs (*at whatever rate the Commission might choose to prescribe*)." (emphasis supplied). *USTA II*, 359 F. 3d at 577.

[125] As Commissioner Copps had stated, "impairment is the touchstone of our unbundling policy under Section 251. It triggers a very specific pricing obligation. All elements unbundled pursuant to Section 251 must be made available to competitors at cost plus a reasonable profit." *Interim Order*, Separate Statement of Commissioner Copps.

seeking access to provide the services that it seeks to offer."[126] Then, the "just and reasonable rate for network elements for purposes of subsection (c)(3) of such section shall be based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element [i.e. TELRIC]."[127]

The latest impairment standard (which *USTA II* did not vacate or remand) considers the following factors: (1) scale economies, (2) sunk costs, (3) first mover advantages, (4) absolute cost advantages and (5) barriers within the control of the ILEC.[128] The Commission considers these factors in light of the alternatives available to requesting carriers for the elements in question, including self-provisioning, non-ILEC providers and intermodal facilities.[129] In regard to dedicated transport, however, the *USTA II* court was unsatisfied with this range of alternatives, and instructed the Commission to consider ILEC alternatives as well, specifically special access.[130]

Considering special access in an impairment analysis is unlawful for two reasons. First, such analysis violates the Commission's statutory directive to consider whether CLEC would be impaired without access prior to price.[131] Second, it is reasonable to assume that when Congress passed the Act, it was aware of the availability of special access, and as such, Congress could have, but did not, consider special access as an alternative, when drafting the impairment, unbundling, and pricing provisions of the Act.

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126 47 U.S.C. § 251(c)(3).

127 47 U.S.C. § 252(d)(1).

128 *TRO* at ¶ 7.

129 *TRO* at ¶¶ 95-97.

130 *USTA II*, 359 F.3d. at 577.

131 47 U.S.C. § 251(d)(1).

Special access is not a unique element, a different technology or an intermodal alternative to some other service, but merely a way of packaging, pricing and marketing certain network elements.[132] Thus, in considering the special access alternative, the Commission is being asked to consider a network element, priced at a retail rate, as an alternative to itself, priced at a TELRIC rate. This is a classic case of putting the cart before the horse and should not be adopted by the Commission.

B. Special Access Use By CLECs Is Overstated

Assuming, *arguendo*, that evidence of CLEC current reliance on special access services is relevant to the impairment analysis (and it is not), the Commission should be skeptical of any such evidence. For example, recent *ex parte* submissions by Verizon[133] concerning CLECs' reliance on special access are devoid any of any support concerning the degree that CLECs rely upon special access. Indeed, Verizon's data appears to combine CLEC and IXC demand, thereby vastly inflating the supposed use of special access by unidentified "CLECs."[134] Verizon also has failed to identify its consultants that collected the information or where they obtained such information. In addition, Verizon has not explained key terms such as "CLEC Lit Building." This could include CLECs using UNEs, cable operators providing cable modem service or some other provider. It is unclear and not explained in the relevant *ex parte* submissions.

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132 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, CC Docket No. 96-98, 15 FCC Rcd 9587, 9603 (2000) (stating that the conversion of special access circuits to UNE status "should not require the special access circuit to be disconnected and re-connected because only the billing information or other administrative information associated with the circuit will change when a conversion is requested.").

133 Letter from Dee May, Verizon to Marlene H. Dortch, CC Docket No. 01-338, July 29, 2004; Letter from Dee May, Verizon to Marlene H. Dortch, CC Docket No. 01-338, August 13, 2004.

134 Letter from John Windhausen, Jr., ALTS to Hon. Michael Powell, Docket Nos. 96-98, 98-147, July 22, 2004 at 4-5.

Verizon's July 29th *Ex Parte* further illustrates why the Commission should be skeptical when considering these submissions.[135] If Verizon's submissions are have any value concerning the extent to which CLECs are using special access, these filings must include verifiable data. Otherwise, this filings should be ignored.

C. Termination Penalties Restrict Use of UNEs

Many CLECs who have been forced to purchase special access in lieu of UNEs rationally sought to do so at the lowest available price. The ILECs offer their lowest prices to customers who accept term and volume commitments.[136] Having done so, however, the CLECs became subject to onerous termination penalties if they sought to convert special access services to UNEs or to EELs. Many CLECs therefore have continued to use special access, rather than UNEs, even after the original obstacles to purchasing UNEs (or EELs) were removed. One CLEC, for example, was only able to convert its special access loop transport combinations to EELs when, in its bankruptcy proceeding, it was able to reject its special access contracts that contained termination penalties. Thus, even though many CLECs use special access instead of UNEs for access to their customers, such use does not prove a lack of impairment; rather it simply demonstrates the CLECs' inability to convert existing circuits.

D. Special Access Does Not Adequately Protect Against a Price Squeeze

ILECs have the ability and incentive to discriminate against CLECs using special access. Under current rules, ILECs enjoy pricing flexibility for special access in most metropolitan

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[135] The July 29 *Ex Parte* provides estimates of CLEC special access use excluding Verizon's two largest special access customers, an essential factor in considering the probative value of this submission. For instance, Verizon does not indicate whether these two excluded special access users are among the seven unnamed CLECs in its other filings. Absent this information, as well as the identity of all these special access users, the reported numbers are meaningless; they are still likely to include IXC demand among other possible undisclosed infirmities. Moreover, it remains impossible to determine whether CLEC purchases of special access reflect a lack of impairment, or simply a lack of alternatives.

markets, and (in any case) need not provide any cost justification for their special access rates under the price cap rules. Indeed, special access rates already are unconscionably high.[137] The Commission has recognized that "in recent years, incumbent LECs operating under price caps have enjoyed historically high rates of return. For instance, in 2001, interstate rates of return for BellSouth, Qwest, SBC, and Verizon were approximately 19%, 22%, 21.5%, and 17%, respectively."[138] Although the Commission has the legal authority to prevent price squeezes and discriminatory pricing, it lacks both the information and the resources to exercise that authority effectively, especially in a "pricing flexibility" regulatory system where rates may change faster than the Commission can investigate them. It is therefore impracticable at this time for the Commission to assure that ILECs could not engage in a price squeeze or discriminatory behavior in connection with special access offerings. *USTA II* asked the Commission to assess the risks associated with special access.[139] The potential for a price squeeze because special access prices are not cost based is a risk that by itself requires the Commission to conclude in its impairment analysis that special access is not a viable alternative to UNEs.

E. Special Access Should Be Accorded Little Weight In Light of a Number of Unlawful BOC UNE Provisioning Policies

To the extent that CLECs are using special access to provide local exchange services, the Commission should note that, in many cases, CLECs have as a practical matter been required to do so. The Commission has an extensive record showing ILEC UNE provisioning delays.[140] In

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136 Of course, smaller CLECs are not able to qualify for any volume discounts.

137 Ad Hoc User Report.

138 Verizon Petition for Emergency Declaratory and Other Relief, WC Docket 02-202, Policy Statement, 17 FCC Rcd 26884 ¶ 18 (2002).

139 *USTA II*, 359 F.3d at 577.

140 *Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, Notice of Proposed Rulemaking, CC Docket No. 01-318, 16 FCC Rcd 20641 (2001).

essence, CLECs in many cases must order special access in order to meet customers' service provisioning dates because of poor, deliberate, UNE provisioning by the ILECs.

ILECs also have unlawfully thwarted CLECs access to UNEs. For example, under Verizon's "no facilities" policy, which it initiated in 2001, and which the Commission in the *TRO* found unlawful, Verizon has declined to fill orders for DS-1 loop UNEs if routine modifications are necessary to fill the order, even though Verizon will perform those same modifications in connection with orders from its own customers. Where routine modifications are necessary, Verizon has only filled the order as special access.[141] Some CLECs have declined to enter the Verizon territory because of this policy, while other CLECs have purchased special access rather than forego a new customer or lose an existing customer. For example, 85% and 15% of Mpower's loops are UNE and special access, respectively, but this would be 100% UNE but for Verizon's unlawful "no facilities" policy. Covad currently is forced to buy some DS-1 loops as special access because Verizon rejects 35% - 40% of its DS-1 orders based on "no facilities." Accordingly, Verizon could claim that Verizon might be able to claim that many CLECs, even those serving small business customers with DS-1s, are using special access in light of Verizon's deliberate and unlawful policy of thwarting its obligation to provide UNEs by of compelling CLECs instead to order special access. In the absence of a detailed and supported explanation by ILECs of the extent to which CLECs use of special access is the result of its illegal "no facilities" or similar policies, current special access provisioning has no probative value whatsoever and should be disregarded.

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[141] Even though *USTA II* affirmed the Commission's rejection of Verizon's "no facilities" policy, since the *TRO*, Verizon has continued to refuse to make routine modifications unless a CLEC accepts an interconnection agreement amendment that includes new, non-recurring charges for the modifications, in amounts that have never been reviewed or approved by any state commission.

Another obvious reason why some CLECs chose to use special access is that loop transport combinations were not available as legal matter until 1999 with respect to existing combinations and until August 2003 with respect to new combinations. The existing combination rules, after having been stayed by the Eighth Circuit in 1996, were reinstated by the Supreme Court in 1999; and the Commission reinstated the new combination rule in August 2003 in the *TRO*. These determinations, however, did not have an immediate practical impact because ILECs delayed implementing them. The Commission has an extensive record in this proceeding, the *UNE Remand Proceeding*, and various pre-filing rocket docket proceedings that detail ILECs' failure to make combinations available. Verizon in particular thwarted CLECs' rights to obtain combinations through its "no facilities" policy. Consequently, some CLECs were forced to use special access services in lieu of UNE combinations. Moreover, ILECs thwarted CLECs efforts to convert special access combinations to UNE status. The EEL "safe harbors" adopted by the Commission in 2000 were unfortunately amenable to manipulation by the ILECs, which was the primary reason the Commission adopted new EEL qualifying standards in the *TRO*.

BOCs will undoubtedly fail to acknowledge the impact of ILEC prohibitions on "commingling" UNEs with tariffed services on CLECs' ability to obtain and use UNEs. This policy prohibited CLECs from connecting UNEs to tariffed services or placing UNE and tariff service traffic on the same facility. This unnecessary policy had no technical or other justification. Its sole purpose was to create a barrier to the use of UNEs. The Commission amassed a substantial record in the *Triennial Review Proceeding* describing the anticompetitive impact on CLECs of this policy and correctly proscribed it. Therefore, special access has little

relevance to impairment for the additional reason that ILECs' unlawful "commingling" restrictions thwarted CLECs' access to UNEs.

F. CLECs Are Not Comparable to CMRS Providers

The Commission should also give special access little weight in the impairment analysis because, contrary to the possible suggestion in *USTA II*, the experience of CMRS providers, whatever its merits otherwise, is not comparable to CLECs. While *USTA II* questioned whether CMRS providers were impaired without access to UNEs in light of their prior use of special access, the broad generalization that CMRS providers have nonetheless been successful is not transferable to CLECs. Simply stated, the financial characteristics and performance of CLECs as an industry group are in no way comparable to that of CMRS providers. CLECs remain start-up companies. At most, the extent to which CLECs could rely on special access is unknown and could not form the basis for a finding of nonimpairment.

Moreover, CMRS providers have for the most part not heretofore competed with wireline services. CMRS providers for all practical purposes have previously competed only with other CMRS providers, all of whom are subject to the same special access charges and therefore conduct their operations on the same playing field. While CMRS is evolving from its status as a *supplement* to wireline service to becoming viable as a competitive *alternative* to local wireline service,[142] there is no basis for transferring the experience of CMRS providers to CLECs who are directly competing with ILECs who are not subject to the same pricing inputs. CLECs use of special access thus would raise completely different competitive issues than has CMRS providers' use of special access . Accordingly, there is no basis for concluding that CLECs may

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142 *TRO* at ¶ 140.

successfully compete against ILECs using special access even assuming that CMRS providers have successfully competed against each other using special access.

For all these reasons, in response to the USTA II direction to consider special access, the Commission should conclude that CLECs are impaired without access to UNEs notwithstanding the availability of the same network element at a higher price as special access.

XII. CONCLUSION

The Commission should adopt comprehensive unbundling rules by year-end in accordance with the discussion herein.

Respectfully submitted,

Andrew D. Lipman
Richard M. Rindler
Jonathan S. Frankel
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, NW, Suite 300
Washington, DC 20007
Tel: (202) 424-7500
Fax: (202) 424-7645

COUNSEL FOR MCLEODUSA
TELECOMMUNICATIONS, SERVICES, INC.

ATTACHMENT 1

Declaration of Todd M. Lechtenberg

McLeodUSA Telecommunications Services, Inc.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	WC Docket No. 04-313 CC Docket No. 01-338

DECLARATION OF TODD M. LECHTENBERG

I, Todd M. Lechtenberg, pursuant to 28 U.S.C. Sec. 1746 do hereby declare, under penalty of perjury, that the following is true and correct:

1. I am Director of Network Planning for McLeodUSA Incorporated.

2. McLeodUSA serves approximately 1 million access lines with 69% of the lines currently being served on our UNE-L platform.

3. For DS0 loops, McLeodUSA relies exclusively on leasing these critical, bottleneck facilities from the Regional Bell Operating Companies. Ubiquitous deployment of DS0 loops is prohibitively expensive.

4. For DS1 loops, McLeodUSA cannot economically justify self-deployment of DS1 loops to an individual customer, because of, among other reasons, sunk costs, limited revenue stream and other economic and operational barriers, including building access issues, rights of way issues as well as unacceptable delays and uncertainties associated with deployment of alternative loop facilities. In addition, in the overwhelming number of markets within our 25-state footprint, McLeodUSA has been unable to locate any wholesale alternatives to the ILECs for the provision of DS1 loops.

5. Most business customers want a maximum 12-month term contract, which prevents McLeodUSA economically from deploying a DS1 loop to that specific customer location. McLeodUSA remains impaired without continued unbundled access to DS1 loops.

6. As a general rule, McLeodUSA cannot cost justify deployment of its own DS3 loops to business customers due to the same economic and operational barriers to entry that prevent self deployment of other loop facilities, including building access issues, rights of way issues as well as unacceptable delays and uncertainties associated with deployment of alternative loop facilities. For instance, in many cases, McLeodUSA's access in building is limited to a "fiber to the floor" arrangement with the customer it serves because McLeodUSA is unable to secure building owners' permission to locate equipment in the buildings common space or access other floors in a building. In a few limited office buildings in the largest MSAs in our footprint where we have deployed on-net facilities into the building, we have deployed DS3 loops to individual customers. The overwhelming majority of our DS3 loops, however, are leased from the RBOCs, and there are virtually no viable alternatives that offer DS3 loops on a competitive wholesale basis. Furthermore, unlike an OC3 loop, a single DS3 loop cannot provide McLeodUSA with sufficient revenue to overcome these barriers to entry. Based on the Commission's impairment analysis that rests most heavily on the ability of a self-deploying carrier to recover its sunk and fixed costs, McLeodUSA is still impaired without access to DS3 loops due to our inability to recover such costs at the DS3 level.

7. McLeodUSA generally leases DS1 transport facilities from the RBOC because of the high fixed and sunk costs associated with self-providing a single DS1 circuit. While we wholesale DS1 transport along some routes in the larger MSAs in our footprint, there are no wholesale alternatives on DS1 transport routes in the majority of our markets. Self-provisioning DS1 transport is not possible because of the high entry barriers associated with deploying or obtaining transport used to serve relatively few end-user customers and the lack of route-specific evidence showing sufficient alternative deployment.

8. This concludes my Declaration.

Executed this 4th day of October, 2004

By: _____

Todd M. Lechtenberg
Director of Network Planning
McLeodUSA Telecommunications
Services, Inc.

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